BellSouth's attempt to invoke Track B thus rests ultimately on its suggestion (Br. 21) that "no CLEC is taking 'reasonable steps' toward providing Track A service in Louisiana." That suggestion however, is contradicted by BellSouth's simultaneous attempt to claim that Track A is satisfied by the existence of "several wireline CLECs" that "are beginning to serve customers." Obviously, if a number of CLECs are so close to providing service that they should count for purposes of Track A, it is nonsense to claim that those carriers are not taking "reasonable steps" to enter. Indeed, BellSouth's own affiant claims that one CLEC (Shell) will "introduce facility-based local exchange services" in Louisiana "by the end of 1997," BellSouth Wright Aff. ¶ 48, and that Cox is "preparing rapidly for an accelerated rollout of facility-based local exchange services to both businesses and residences nationwide," with "New Orleans . . . currently among [its] top national market clusters." Id. ¶ 55. Under the Commission's SBC Oklahoma Order, Track B cannot be invoked in these circumstances.

III. BELLSOUTH CURRENTLY OPERATES IN VIOLATION OF SECTION 272 AND HAS PROVIDED NO BASIS FOR A FINDING THAT IT WILL OPERATE IN ACCORDANCE WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY

Section 271(d)(3)(B) requires the Commission to deny BellSouth's application unless it finds that the "requested authorization will be carried out in accordance with the requirements of section 272." This Commission has stressed that this requirement is "of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate." Ameritech Michigan Order ¶ 346.

BellSouth's application and its actions to date provide no basis for a finding that it will comply with section 272. BellSouth currently violates the public disclosure requirements of section 272(b)(5), and openly defies the requirements of the Act and this Commission's holding in the Ameritech Michigan Order by asserting that it is not currently subject to the restrictions of section 272. BellSouth has provided wholly inadequate information concerning its substantial transactions with BellSouth Long Distance ("BSLD"), again in outright defiance of the holding in the Ameritech Michigan Order. BellSouth also has stated its intent to violate the "equal access" requirements of section 251(g) as dictated by the Ameritech Michigan Order when it begins joint marketing of its long distance services under section 272(g). Finally, BellSouth has not instituted any internal procedures or practices to protect against violations of section 272, and has not presented even a plan on how it intends to "true up" those past transactions with its long-distance affiliate that were in violation of section 272 so that its affiliate does not enter the long-distance market with unlawful subsidies and other discriminatory advantages. Instead, BellSouth presents only paper promises of future compliance, while asserting its freedom to violate section 272 up until it receives interLATA authorization.

Section 272(b)(5) requires that "all transactions" between a BOC and its affiliate created to provide interLATA service be "reduced to writing and available for public inspection." These disclosure requirements, as this Commission made plain in the Ameritech Michigan Order, have required BOCs and their section 272 affiliates, since the passage of the Act on February 8, 1996, to make publicly available "in some manner" all transactions for information, services, or facilities in which they have been engaged. Ameritech Michigan Order ¶ 371.[41] In addition,

[41] BellSouth has asked the Commission to reverse this holding, arguing that section 272 only binds a BOC and its long-distance affiliate after interLATA authority has been granted. Br. 76. Section 272, however, contains no such limitation, and instead applies by its terms whenever a BOC creates an affiliate to provide interLATA services. The fact that section 271(d)(3)(B) calls upon the Commission to make a predictive judgment that a BOC and its section 272 affiliate "will comply" with section 272, does not alter the fact that Section 272 (continued...)

the Accounting Safeguards Order[42] issued December 24, 1996, requires that all BOC transactions with Section 272 affiliates be posted on the Internet,[43] which requirements became effective on August 12, 1997.[44]

BellSouth has been and continues to be in violation of section 272(b)(5). BellSouth's section 272 affiliate, BSLD, was incorporated approximately one month after the Act's enactment, in March 1996, and BellSouth has identified fifteen categories of separate services with a total cost of almost $9.2 million that it has provided to BSLD. McFarland 272 Aff. ¶ 8. Yet BellSouth did not make any public disclosure of its transactions with BSLD until after its South Carolina section 271 application on September 30, 1997, and today continues to violate the disclosure requirements by revealing a total of only seven written agreements between itself and BSLD at its corporate headquarters and on its internet site. Id. ¶ 32; see Ameritech Michigan Order ¶ 367 (concluding that Ameritech and its affiliate must "disclos[e] publicly all of their transactions as required by section 272(b)(5)" (emphasis added)).

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[41] (...continued)
itself mandates current compliance, as the Commission has found. In any event, BellSouth -- which has created a section 272 affiliate, has engaged in numerous transactions with that affiliate, and has stated that it has been and is in compliance with section 272 -- cannot hope to meet its burden of establishing that it "will comply" with the restrictions of section 272 unless it shows that it currently is complying with section 272.

[42] Accounting Safeguards under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, FCC 96-490 (rel. Dec. 24, 1996) ("Accounting Safeguards Order").

[43] The Accounting Safeguards Order requires the Section 272 affiliate, "at a minimum, to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transactions through the company's home page." Accounting Safeguards Order, ¶ 122.

[44] See Ameritech Michigan Order ¶ 364 n.939.

In addition, the limited disclosure of these fifteen categories of services in the present application, see Jarvis Aff. at 7-11, is completely inadequate under Section 272 and in bald violation of the Ameritech Michigan Order. The Accounting Safeguards Order made clear that "the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow [the Commission] to evaluate compliance with [the] accounting rules." Accounting Safeguards Order ¶ 122. Here, the descriptions of the fifteen different categories of "services" provided by BellSouth to BSLD come nowhere near providing the detail necessary to meet this requirement. First, not one of the descriptions contains the actual rates charged for each transaction, as required in the Ameritech Michigan Order ¶ 369, but instead provides only a total cost figure for all the transactions grouped under a particular service category. Nor do these descriptions identify prices or other specific terms and conditions of each transaction.[45] BellSouth even limits this meager disclosure to services "through August 31, 1997," Jarvis Aff. at 7, thus providing no description of transactions after that date up to the time of its current application.

Plainly, BellSouth's simple recitation of the types of services provided and the total aggregate costs for these services provides no basis to evaluate its compliance with the accounting rules, and therefore precludes any finding that BellSouth will carry out the requested authorization in accordance with Section 272. Cf. Ameritech Michigan Order ¶ 369 ("Because

[45] In at least one case, the general description is itself suggestive of potential discrimination. BellSouth appears to have indefinitely reserved collocated space for BSLD for a two-year term that does not begin until its "equipment becomes operational," (Jarvis Aff. ¶ 14(c), at 10), while other carriers have no such right to reserve collocated space indefinitely. See Varner Aff. Exhibit AJV-4 at 9 (BellSouth's SGAT offers collocation "based on space availability and on a first come, first serve basis."); McFarland 272 Aff. ¶ 29 (BellSouth's Physical Collocation Master Agreement offers collocated space for a two-year term beginning on the date the collocation agreement is signed, rather than from the date the equipment becomes operational).

Ameritech has failed to provide a sufficiently detailed description of the transactions to allow us to evaluate compliance with our accounting rules, we are unable to find that Ameritech will carry out the requested authorization in accordance with section 272."). BellSouth at least must disclose to this Commission whatever written agreements it has with BSLD reflecting the almost $9.2 million worth of services it has provided. Of course, if these services have not been memorialized into written agreements, and instead are the result of the ad hoc provision of information and services, that itself would be a violation of section 272(b)(5), which requires that all transactions between the BOC and its affiliate be "reduced to writing."

In addition, BellSouth has identified no internal systems or procedures in place that specifically are designed to protect against violations of Section 272, and instead promises only that such programs "will be" instituted at some unspecified future date. Br. 82; see McFarland 272 Aff. ¶¶ 34-38. Such internal programs are a crucial aspect of a BOC's efforts to comply with section 272. For example, some BOCs have instituted oversight programs to review and approve transactions between the BOC and section 272 affiliate and have required that all communications and transactions proceed through identified customer contacts to attempt to ensure that access to information and services is uniform for affiliates, CLECs, and IXCs, and to limit unlawful "off-the-record" exchanges of information and services between the BOC and affiliate. See id. ¶ 37. Without a showing by BellSouth that it has instituted internal systems or procedures geared specifically to the unique compliance problems presented by section 272, there is simply no basis to make any judgment on whether it is ready and able to comply with section 272.

Nor has BellSouth presented any specific information as to what efforts it has made to identify past transactions that have impermissibly subsidized BSLD or otherwise discriminated in favor of BSLD. Given that BellSouth and BSLD have operated under the view that the restrictions of section 272 have not applied to their transactions to date, such a review of past transactions is imperative. Similarly, BellSouth has not presented any plans to remedy, through "true-up" or otherwise, whatever impermissible subsidies or discrimination already have occurred, which, unless rectified, would allow BSLD to enter the interLATA market with anticompetitive advantages. Id. ¶ 44.

Finally, BellSouth asserts that, once it gains interLATA authority, it will provide joint marketing services for BSLD pursuant to section 272(g)(2) and will instruct its customer service representatives that, when handling inbound customer calls for new local exchange service, they are to recommend that the customer accept long distance service from BSLD and are not to recite a list of long distance carriers unless the customer requests that such a list be read.[46] This suggested telemarketing practice on its face violates the equal access requirements of section 251(g), and again defies this Commission's Ameritech Michigan Order.

The equal access requirements oblige a BOC to inform new local exchange customers of their right to select the IXC of their choice, and, when identifying the available IXCs in the service area, the BOC must randomly list these IXCs, so that one is not favored over another.[47]

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[46] BellSouth has identified the following telemarketing script as acceptable for inbound calls: "You have many companies to choose from to provide your long distance service. I can read from a list the companies available for selection, however, I'd like to recommend BellSouth Long Distance." Varner Aff. ¶ 223.

[47] The Commission long ago directed that "LEC personnel taking [a] verbal order should provide new customers with the names and, if requested, the telephone numbers of the IXCs and should devise procedures to ensure that the names of IXCs are provided in random order." Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 101 FCC 2d 935, 950 (1985); see also United States v. Western Elec. Co., Inc., 578 F.Supp. 668, 677 (D.D.C. 1983) (holding that, when receiving calls for new service and advising customers of their choices of IXCs, BOC may show "no favoritism" to any particular IXC).

Section 251(g) of the Act makes clear that these "equal access . . . restrictions and obligations" continue to apply to BOCs "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission." Because these equal access requirements have not been "explicitly superseded by regulations," they apply with full force today.

In the Ameritech Michigan Order, the Commission found that a marketing script essentially identical to the script now proposed by BellSouth, if used during inbound calls for new service, would give section 272 affiliates "an unfair advantage over other [IXCs]," and was barred by existing equal access obligations. Id. ¶ 376. As the Commission concluded, such a marketing practice "is inconsistent on its face with [the] requirement that a BOC must provide the names of interexchange carriers in random order." Ameritech Michigan Order ¶ 376. The Commission's conclusion plainly was required by § 251(g)'s continuation of the equal access obligations. See Application of Pacific Bell Communications for a Certificate of Public Convenience and Necessity to Provide InterLATA, IntraLATA and Local Exchange Telecommunications Service Within the State of California, Calif. PUC, A.96-03-007 (May 5, 1997) ("The equal access requirement is an empty formalism if Pacific Bell can satisfy it by simply referring to 'many choices,' and then describing its affiliate's long distance service in detail.").

BellSouth makes a facial attack on these equal access requirements, arguing that the requirement that they identify IXCs in random order is no longer needed, is "needlessly burdensome," and will undermine their marketing efforts. Br. 81-82. These claims, however, depend on mischaracterizations of the current equal access requirements. For example, BellSouth argues that under the Ameritech Michigan Order it would be required to "list every interexchange carrier even when the customer . . . has already made up his or her mind." Br.

81. The equal access rules, however, require no such thing: if the customer requests service from a particular IXC, there is no requirement that a BOC go on to read a list of IXCs.[48] Nor does the enforcement of the equal access requirements, as BellSouth asserts, "nullify the BOC's statutory joint marketing right." Id. at 81. BOCs are able to take full advantage of their joint marketing authority under § 272 for outbound calls. But on inbound calls, § 252(g) requires that BOCs' marketing efforts be fully consistent with the same equal access requirements under which they have operated for over a decade.

BellSouth also claims that the Non-Accounting Safeguards Order implicitly eliminated the equal access requirement that bars them from identifying only their own affiliate's long distance services on inbound calls for new service. Br. 80-81. The Non-Accounting Safeguards Order,[49] however, made plain that the equal access requirements remain in effect, concluding that "BOCs must provide any customer who orders new local exchange service with the names . . . of all of the carriers offering interexchange service in its service area," and "[a]s part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order." Non-Accounting Safeguards Order ¶ 292. BellSouth's reliance on the Commission's citation of an ex parte submission from NYNEX is misplaced. This bare citation, without more, cannot be read to approve any particular marketing practice, and plainly did not overturn existing equal access requirements. Indeed, the interpretation offered by BellSouth --

[48] Of course, once a customer selects a particular IXC other than the BOC's affiliate, the BOC is affirmatively barred by the equal access requirements from attempting to change the customer's mind by marketing its own affiliate's services.

[49] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking (rel. Dec. 24, 1996) ("Non-Accounting Safeguards Order").

that the Commission impliedly amended part of the equal access requirements through this citation -- is expressly barred by § 252(g), which requires that all existing equal access requirements will remain in effect until the Commission "explicitly supersedes" these requirements "by regulations."

On this record, there is no basis for a finding that BellSouth will operate in accordance with section 272, and BellSouth's application can be rejected on this ground alone.

IV. BELLSOUTH HAS NOT SHOWN THAT ITS ENTRY INTO THE INTEREXCHANGE MARKET IS CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

Finally, BellSouth's application should be denied because BellSouth has not shown, and cannot show, that its interLATA authorization would be "consistent with the public interest, convenience, and necessity." See § 271(d)(3). BellSouth's continuing resistance to competition means that BellSouth's interLATA entry would harm consumers in local and long distance markets alike.

A. BellSouth Bears The Burden Of Establishing That Its InterLATA Authorization Is In The Public Interest

Section 271 and the Ameritech Michigan Order unambiguously place upon BellSouth the burden of establishing that its entry is in the public interest. See § 271(d)(3) ("The Commission shall not approve the authorization . . . unless it finds that . . . the requested authorization is consistent with the public interest, convenience, and necessity.") (emphasis added); Ameritech Michigan Order ¶ 43 ("Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied.")

Notwithstanding this authority, BellSouth maintains that BOC entry into the interexchange market is presumptively in the public interest. Br. 88. This startling proposition conflicts not only with the burden of proof as imposed by the statute and this Commission, but with the premise, central to the MFJ and preserved in the Act, that integration of the BOCs' local exchange monopolies with interexchange service is anticompetitive and contrary to the public interest. For this reason, the 1996 Act creates mechanisms and incentives to break up the BOCs' local monopolies before BOC entry into long distance is permitted. See § 271(d)(3). Indeed, by rejecting the BOCs' pleas for long distance entry by a "date certain" and for elimination of the separate public interest inquiry,[50] Congress decisively foreclosed any presumption that BOC entry was in the public interest.

B. The Absence Of Competition In Louisiana Local Exchange Markets Demonstrates That BellSouth's Entry Into The Interexchange Market Would Be Inconsistent With The Public Interest

In the Ameritech Michigan Order, the Commission held that the public interest "inquiry should focus on the status of market-opening measures in the relevant local exchange market" (id. ¶ 385) and determine whether the "local telecommunications market is, and will remain, open to competition." Id. ¶ 386. For all practical purposes, the local market in Louisiana remains closed to competition. Given BellSouth's demonstrated ability to forestall competitive entry, long distance relief will not be in the public interest until competitors manage to establish widespread facilities-based competition.

That time may now be further delayed given the Eighth Circuit's decision, on rehearing, to vacate the principal rule implementing the BOCs' statutory obligation to provide

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[50] See Discussion Draft, dated January 31, 1995, 104th Cong., 1st Sess., introduced by Senator Pressler, Section 255(a), at 54-57; see also infra pages 91-92 (discussing Congress's decision to preserve a separate public interest inquiry).

nondiscriminatory access to UNE combinations.[51] Before that decision, it might have been reasonable to expect that UNE-based competition could relatively soon have mitigated most of the substantial public interest concerns addressed by the current prohibition on BOC provision of in-region, interLATA services. Such an expectation was dependent upon a BOC actually fulfilling its obligation to provide nondiscriminatory access to UNE combinations at forward-looking cost, and to provide the OSS interfaces and other arrangements needed to use such combinations to provide commercial service. If it did so, new entrants would then be able to offer consumers many of the benefits -- innovation, new services, and lower prices -- that otherwise can come only through real facilities-based competition.

Of course, BOCs remain free, even after the Eighth Circuit's decision, voluntarily to offer such access, and any who are serious about gaining interLATA entry may choose to do so. But if a BOC refuses to provide new entrants with effective means to compete using unbundled network elements -- regardless of who does the combining -- then the Act will not quickly achieve its goal of bringing consumers the benefits of local competition; BOCs would continue to wield exclusive control over their essential local facilities, alone enjoying the use of those facilities at cost, and the ability to define retail offerings. As a result, only a BOC would be able to offer, on any meaningful scale and with any meaningful vigor, bundled local and long distance service. InterLATA authorization could then be in the public interest only when significant, broad-based facilities-based entry had occurred.

[51] In light of the Eighth Circuit's unfortunate, and in AT&T's view unfounded, decisions diluting the Act and the Commission's decisions thereunder, rigorous application of the public interest test is necessary and appropriate.

1. There Is No Effective Competition In The Local Exchange Market Due To BellSouth's Efforts To Thwart Entry.

As the Commission recently reaffirmed, the local exchange market remains "one of the last monopoly bottleneck strongholds in telecommunications." Non-Accounting Safeguards Order ¶ 205. Louisiana's local exchange markets, which are completely dominated by BellSouth, are certainly no exception. BellSouth has not unbundled a single loop in Louisiana and currently faces no facilities-based competition for residential customers in the State. Hubbard/Lehr Aff. ¶ 55. In its Louisiana service territory, BellSouth has resold little more than 7,000 access lines. Id. In sum, it is clear that BellSouth controls virtually all of the access lines in its service area, and that customers in BellSouth's Louisiana service areas have no realistic choice in selecting their provider of local exchange service. As BellSouth's overwhelming market share vividly illustrates, there are currently no competitors capable of constraining BellSouth's ability or incentive to engage in anticompetitive behavior. Id. ¶¶ 47-66.

Faced with a Louisiana local exchange marketplace with almost no meaningful facilities-based competition, BellSouth raises essentially three arguments. First, BellSouth maintains that the threat of competition from potential facilities-based carriers "imposes significant competitive constraints on BellSouth." Br. 122. This reliance on the possibility of future local exchange competition to gain entry now into long distance conflicts with both law and sound economic principles. The strict requirements of Section 271 belie any suggestion that the mere promise of future competition constitutes a basis for authorizing BOC entry into in-region, interLATA markets. The mere proximity of BellSouth customers to other carriers' networks does not establish the existence of competition in local exchange markets today, or even in the future, because the costs of extending existing facilities to reach new customers is likely to be prohibitive. Hubbard/Lehr Aff. ¶ 65. The economic reality is that potential competition will not act as an effective competitive constraint so long as there are entry barriers into the relevant market. Baumol Aff. ¶¶ 24-33. As demonstrated below, there clearly remain substantial barriers in the local exchange market, as reflected most strongly in the absence of competition in that market.

Second, BellSouth argues that it "faces a competitive threat from wireless providers." Br. 122. However, as described above, although PCS may offer a viable alternative to wireline service in the future, PCS is not a viable alternative today. This is so because PCS is inherently more costly than wireline service and has limitations that make it unsuitable for many households as a potential replacement for wireline service. Roderick Aff. ¶¶ 8-11. As a result, current estimates of PCS penetration rates are only about 1.5 percent, and BellSouth's own survey results indicate that, among these small numbers of PCS subscribers, only 3 percent have replaced their residential wireline phones with PCS service. Hubbard/Lehr Aff. ¶ 56.

Third, BellSouth asserts that CLECs have avoided the Louisiana market merely to "pursue more profitable markets and to protect long distance profits." Br. 123. This claim is baseless. BellSouth admittedly has 76 interconnection agreements with CLECs -- many of whom have no long distance revenues whatsoever. See Br. 6 and n.5. BellSouth offers no cogent reason why these carriers would undertake the trouble and expense of negotiating interconnection agreements if they had no intention of entering the Louisiana local exchange market. Nor can BellSouth reconcile its contention that IXCs have purposely avoided the Louisiana market with AT&T's diligent and costly efforts to enter that market. See Carroll Aff. ¶¶ 5, 11-22. Indeed, as an examination of many of the public interest considerations raised in the Ameritech Michigan Order (¶¶ 391-397) demonstrates, the absence of competition in the local market is caused not by CLEC foot-dragging, but is directly caused by BellSouth's efforts to preserve its monopoly status and by a hostile state regulatory environment. See Carroll Aff. ¶¶ 13-37; Norris Aff. ¶¶ 12-21; Follensbee Aff. ¶¶ 18-21, 30.

In its public interest analysis in the Ameritech Michigan Order, ¶ 391, the Commission stressed that "it is essential to local competition that the various methods of entry contemplated by the 1996 Act be truly available." By (i) refusing to offer UNEs, including combinations of UNEs, at forward-looking, cost-based rates or with their full features, functions, and capabilities; (ii) providing grossly inadequate OSS; and (iii) refusing to offer for resale the individual contract service arrangements that it uses to lock up large customers, BellSouth has ensured that two of the three modes of CLEC entry -- unbundled network elements and resale -- are effectively foreclosed. See Carroll Aff. ¶¶ 13-37; Falcone/Lesher Aff. ¶¶ 8-39; Tamplin Aff. ¶¶ 7-75; Bradbury Aff. ¶¶ 20-316; McFarland Resale Aff. ¶¶ 10-26; Follensbee Aff. ¶¶ 5-63.

Moreover, BellSouth has not taken other steps cited by the Commission as "conducive to efficient, competitive entry." Ameritech Michigan Order ¶ 392. Far from endorsing "pick and choose" most favored nation clauses that enable competitive alternatives to "flourish rapidly throughout a state," id., BellSouth has challenged this Commission's authority even to consider such contractual provisions in its public interest analysis.[52]

In addition, while BellSouth has agreed to some performance monitoring in the BellSouth/AT&T interconnection agreement, the measurements to which it has agreed are insufficient to gauge "compliance with its obligation to provide access and interconnection to

[52] Petition of BellSouth Corporation For Reconsideration and Clarification, In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, at 10, 15-16 (filed September 18, 1997).

new entrants in a nondiscriminatory manner." Ameritech Michigan Order ¶ 393; Pfau Aff. ¶¶ 20-85. BellSouth also has made no showing that it has agreed to "private and self-executing enforcement mechanisms that are automatically triggered by noncompliance" with established performance standards. See Ameritech Michigan Order ¶ 394. The BellSouth/AT&T Interconnection Agreement, § 12.3, provides only that the parties shall develop a "process improvement plan" if BellSouth's performance falls below the level of performance it has agreed to provide. Because, however, it does not impose any self-executing penalties on BellSouth for inadequate performance, it is not "sufficient to ensure compliance with the established performance standards." See Ameritech Michigan Order ¶ 394.

Further, entry barriers into Louisiana local exchange markets have been raised even higher by the LPSC's failure to require BellSouth to comply with the Act and this Commission's orders. The LPSC ignored, without any analysis or explanation, detailed findings and conclusions of the LPSC's Chief ALJ, demonstrating the numerous ways in which BellSouth's OSS and cost evidence failed to comply with federal law. See Norris Aff. ¶¶ 5-20; Follensbee Aff. ¶¶ 18-21, 30. The LPSC's indifference, if not hostility, to the procompetitive requirements of the Act serves only further to chill local entry.

2. BellSouth's Premature Entry Into The Interexchange Market Would Provide BellSouth Incentive And Opportunity To Harm Competition

Having conceded the lack of any meaningful competition in Louisiana, BellSouth argues that its entry into long distance will spur local competition as interexchange carriers and other competitors are forced to "'respond with competitive offerings'." Br. 119 n.88 (quoting Hausman Aff. ¶ 9). This argument defies common sense. As demonstrated above, it is BellSouth's anticompetitive behavior that has prevented CLECs from penetrating Louisiana's local market. BellSouth's entry into long distance will not bring down any of the insurmountable barriers to effective competition that it has erected.

To the contrary, currently BellSouth's only incentive to open local markets is the prospect of long distance entry. Hubbard/Lehr Aff. ¶¶ 90, 97-100. Once BellSouth is granted interLATA authority, its sole incentive will be to further impede the development of local competition, both to protect monopoly revenues it enjoys from local exchange and exchange access services, and to maintain its anticompetitive advantages over other carriers that would otherwise seek to provide bundles of local and long distance services in competition with it. Hubbard/Lehr Aff. ¶¶ 88-116; Bork Aff. ¶ 20.[53]

Granting BellSouth's application now would therefore immediately create a second monopoly in addition to BellSouth's current monopoly over local exchange service -- a monopoly over the provision of bundled packages consisting of BellSouth's local service and long distance service (which BellSouth could buy at a wholesale discount that dwarfs the 20.72 percent discount available to would-be CLECs in Louisiana). BellSouth witnesses Gilbert and Hausman argue that BellSouth must be allowed to enter long distance to compete for the provision of bundled goods. Gilbert Aff. ¶¶ 6-17; Hausman Aff. ¶ 7. However, as the record in this case demonstrates, there is no meaningful competition in the local market. Therefore, BellSouth would be the only carrier with the opportunity to offer end-to-end service in significant volumes,

[53] Professor Marius Schwartz recently noted the incentive and ability of BOCs to delay competition by refusing to cooperate with competitors. Supplemental Affidavit of Marius Schwartz on behalf of the U.S. Department of Justice, Application of BellSouth Corporation to Provide In-Region, InterLATA Long Distance Services in South Carolina, CC Docket No. 97-208, November 4, 1997, ¶ 34 ("Schwartz Supp. Aff.")("BOCs repeatedly and successfully delayed the introduction of dialing parity, long after it was determined to be in the public interest").

and would be able to foreclose competition for the numerous subscribers that would find that offering attractive. Hubbard/Lehr Aff. ¶¶ 96, 122-27.

BellSouth could also harm long distance competition in numerous ways. It could, for example, engage in a classic price squeeze against its long distance competitors merely by continuing to impose inflated charges for non-competitive exchange access. Id. ¶¶ 101-04; Baumol Aff. ¶¶ 13-15, 39. BellSouth's argument that a price squeeze would be unlikely to drive existing long distance carriers out of business is beside the point. Price squeezes of this sort are anticompetitive regardless of whether carriers are driven to bankruptcy, because they divert long-distance customers to the BOC even when the BOC is the less efficient alternative. Hubbard/Lehr Aff. ¶ 102 & n.92.

If unconstrained by competition, BellSouth could also use local exchange revenues to subsidize its long distance business. Through a variety of means, it could mischaracterize costs of providing long distance services as local exchange costs, recover those costs from monopoly ratepayers, and thus price its long distance service below cost with no loss to itself -- thereby harming consumers in both the local market and the long distance market. Hubbard/Lehr Aff. ¶ 107; Bork Aff. ¶¶ 21-29. Contrary to BellSouth's claim, price caps cannot prevent such anticompetitive cost misallocation, because whenever a price cap is set or modified to reflect new technology, the regulator must take account of the BOC's costs to arrive at a cap that covers costs and allows a reasonable rate of return. In establishing these costs, the BOC has the same incentive and opportunity to shift costs from long-distance service to local service that it has under traditional rate of return regulation. Bork Aff. ¶ 34 n.1.

BellSouth also would have powerful incentives to discriminate in the pricing and provisioning of monopoly exchange access services to its "captive" long distance competitors, so as to raise their costs and degrade the quality of their service. Hubbard/Lehr Aff. ¶¶ 67-87. Such discrimination would allow BellSouth both to expand its share of the long distance market by disadvantaging carriers that provide "stand alone" long distance service, and to protect its local market and customer base from competitors seeking to provide bundled long distance and local services. See Notice of Proposed Rulemaking, Non-Accounting Safeguards ¶ 139 (July 18, 1996) ("Non-Accounting Safeguards NPRM") ("To the extent customers value 'one-stop shopping,' degrading a carrier's interexchange service may also undermine the attractiveness of the carrier's interexchange/local exchange package and thereby strengthen the BOC's dominant position in the provision of local exchange service.").

BellSouth's principal response to the risk that it will engage in anticompetitive conduct if permitted in the long distance market is to trumpet the efficacy of regulation. If, however, regulation alone were sufficient to deter anticompetitive conduct, Congress need not have included a public interest test in the Act at all, but could have merely conditioned BOC in-region, interLATA entry upon the adoption of appropriate regulations. See Ameritech Michigan Order ¶ 388 ("Section 271 . . . embodies a congressional determination that . . . local telecommunications markets must first be opened to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market.") Moreover, BellSouth's continuous flouting of this Commission's orders, which has gone unchecked by the LPSC, fully refutes BellSouth's contention that regulation will restrain its anticompetitive conduct.

Furthermore, BellSouth fails to acknowledge that its anticompetitive conduct would remain exceptionally "difficult to police, particularly in situations where the level of the BOC's cooperation with unaffiliated . . . carriers is difficult to quantify." Non-Accounting Safeguards

NPRM ¶ 139; Hubbard/Lehr Aff. ¶¶ 73-87; Bork Aff. ¶¶ 24-29. It contends that discrimination would be a virtual impossibility because it would require conduct that would be invisible to "other interexchange carriers . . . [and] regulators, yet is so apparent to customers that it drives them to switch to BellSouth's long distance service, but not the service of some other competitor." Br. 108. Such rhetoric entirely misses the central point about the limitations of regulation and competitor vigilance: The problem confronting regulators is not that discrimination would be difficult to observe. The problem, rather, is that it is extremely costly and nearly impossible to prove that cross-subsidies, cost shifting, or service degradation is the product of anticompetitive discrimination rather than justifiable business practice. Hubbard/Lehr Aff. ¶¶ 74-82; Bork Aff. ¶¶ 24-29; Schwartz Supp. Aff. ¶ 38.

Again, BellSouth's own conduct best illustrates the extreme costs of relying exclusively on regulation to control the anticompetitive behavior of a monopolist. By continuously seeking reconsideration of settled rulings, BellSouth has been able effectively to forestall implementation of the Commission's orders regarding pricing and UNE combinations. See Br. 24 & n.27 (citing appeals and petitions challenging the Commission's rules and orders). Indeed, BellSouth's present application, which is openly contrary to several rulings of this Commission, further illustrates BellSouth's ability to use the regulatory process to postpone the time when it must comply with its existing obligations under the Act and this Commission's orders. See, e.g., Br. 24-25, 35 n.31, 79-80, 85-88; see also Hausman Aff. ¶¶ 10-11, 25. Such conduct should not be surprising, in light of BellSouth's candid acknowledgement that "[i]t is rational

. . . for the dominant incumbent to exploit the regulatory regime to the greatest possible extent without exposing itself to the threat of intervention or adverse changes to the regime."[54]

In addition to this fundamental failure of BellSouth to comply with sections 251 and 252 of the Act, BellSouth has engaged in a host of anticompetitive activities that belie its claims that its expansion into long distance markets would be in the public interest. See Ameritech Michigan Order ¶ 397. This is seen most starkly in the intraLATA toll market. BellSouth has consistently opposed introducing competition of any kind into the intraLATA toll market, and has even opposed services that could incidentally be used to complete such calls. See id. ¶¶ 84-86.

For example, even after intraLATA toll competition was ordered by the South Carolina Public Service Commission, BellSouth engaged in blatantly discriminatory and anticompetitive behavior. In 1993, BellSouth, as part of an offering called "Calling Area Plus," entered into an industry stipulation under which all carriers, interexchange carriers and LECs, would pay the same terminating access charges to the LEC that completed intraLATA toll calls. AT&T later discovered, however, that BellSouth had entered into a secret side agreement with certain independent LECs. Under this secret agreement, these LECs charged each other lower access charges than they were charging competing interexchange carriers. After the secret deal was exposed, BellSouth was forced to enter into a new stipulation giving IXCs more favorable treatment. Hubbard/Lehr Aff. ¶ 84.

BellSouth has also thwarted competition by shrinking the intraLATA toll market. It has aggressively expanded its local calling areas, and thus transformed what used to be intraLATA

[54] BellSouth New Zealand, Regulation of Access to Vertically-Integrated Natural Monopolies: A Discussion Paper at 2 (Sept. 29, 1995).

toll calls (subject to competition) into local calls (which are not subject to competition). Moreover, recently BellSouth has introduced new calling plans in Georgia and Florida that offer a flat-rate for all calls within the LATA. This is a classic price squeeze: In many instances BellSouth's flat rate is below the usage-sensitive access charges that its competitors must pay for the same calls. Therefore, interexchange carriers cannot compete with BellSouth, even if they are more efficient. Id. ¶ 85.

Finally, the Florida and Kentucky commissions recently ordered BellSouth to stop employing a number of anticompetitive marketing practices in the intraLATA toll market. Id. ¶ 86. A similar complaint is pending in Georgia. Id.

In sum, for so long as BellSouth's competitors remain critically dependent upon access and interconnection to BellSouth's network, BellSouth can engage in numerous forms of discrimination that cannot be forestalled by regulation. BellSouth's own blatant refusals to comply with the requirements of the Act and this Commission's order are powerful evidence that it would be contrary to the public interest to admit BellSouth into the long distance market until substantial facilities-based competition secures a competitively open local market.

3. BellSouth's Contention That The Public Interest Inquiry Should Not Examine Local Competition Lacks Merit

Lacking any meaningful response to the absence of local competition, BellSouth contends that local competition should be deemed off-limits to the public interest inquiry. Br. 84-88. The Commission rejected that view in the Ameritech Michigan Order, ¶ 386, and should do so again here.

First, it is settled law that the impact on competition must be considered as part of an inquiry into the public interest, convenience, and necessity. Denver & Rio Grande Western

R.R. Co. v. United States, 387 U.S. 485, 492 (1967); United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980). Indeed, given that the BOCs' ability to leverage their local service and exchange access monopolies lies at the heart of the ongoing interLATA restriction, it would be absurd to lift the interLATA quarantine without first considering whether the condition that necessitated the quarantine persists.

Second, consideration of local competition under the public interest test does not "extend" the competitive checklist. While the checklist specifies the minimum terms that BOCs must provide, the public interest test assures that BOC entry will not occur so long as it would generate anticompetitive effects in telecommunications markets. See § 271(d)(3). Because the Commission has not adopted a rigid requirement as to additional terms BOCs must offer in every State, it has not added to the checklist -- any more than Congress did when it added a separate public interest requirement. See Ameritech Michigan Order ¶ 391 ("We emphasize that, unlike the requirements of the competitive checklist, the presence or absence of any one factor will not dictate the outcome of our public interest inquiry.").

Third, BellSouth's efforts to screen local competition from the public interest analysis conflict with the legislative history of the Act. Making selective use of this history (see Br. 86-87), BellSouth omits mention of the most directly pertinent point: During deliberations over the Act, the Senate tabled -- by a vote of 68 to 31 -- an amendment providing that "[f]ull implementation of the [competitive] checklist . . . shall be deemed in full satisfaction of the public interest, convenience, and necessity." 141 Cong. Rec. S7960, S7971 (daily ed. June 8, 1995).[55] Congress's deliberate decision to keep the "public interest" test as a separate and

[55] The Conference committee adopted this provision from the Senate Bill. See Conf. Rep. at 149.

independent requirement establishes that satisfaction of the checklist is no substitute for actual effective local competition that would justify BOC long distance entry.[56]

C. Because The Interexchange Market Is Already Vigorously Competitive, BellSouth's Claims Of Likely Consumer Benefits From Its Entry Are Baseless.

In arguing that its entry would be in the public interest, BellSouth predicts that its entry into the interexchange market would produce tremendous benefits by making that market more competitive. In particular, it cites "welfare analyses" of the WEFA Group and Professor Jerry Hausman, who each contend that BellSouth's in-region, interLATA entry will drive down long distance prices and stimulate the economy. But the logic of these witnesses is untenable: They anticipate enormous benefits from the entry of one firm into a market that already has hundreds of firms openly fighting for customers, but perceive (to the extent they address the issue at all) only "very small" gains from the removal of entry barriers in a local market that has long been dominated by a single monopolist. Hausman Aff. ¶ 25. To put BellSouth's claims into perspective, a modest $0.01 per minute reduction in the price of local calls could save consumers on the order of $15 billion per year, more than <u>twice</u> the annual savings estimated by BellSouth (Br. iv) from reducing long distance prices an extraordinary 18 percent. Hubbard/Lehr Aff. ¶ 122 & n.106.

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[56] In addition, Congress expressly concluded that the MFJ's section VIII(C) test -- "whether there is no substantial possibility that the BOC or its affiliates could use monopoly power to impede competition in the market such company seeks to enter" -- would be an appropriate standard for the Attorney General, and thus the Commission, to employ in evaluating a BOC's application. <u>See</u> Conf. Rep. at 149. The MFJ court consistently construed the VIII(C) standard to require an examination of the competitive conditions in the BOC's local market in order to asses whether the BOC continued to enjoy a bottleneck monopoly power that could be leveraged into market power in the market the BOC sought to enter. <u>See</u>, <u>e.g.</u>, <u>United States</u> v. <u>Western Elec. Co.</u>, 673 F. Supp. 525 (D.D.C. 1987), <u>aff'd on this ground</u>, 900 F.2d 283 (D.C. Cir. 1990), <u>cert. denied</u>, <u>MCI Communications Corp.</u> v. <u>United States</u>, 498 U.S. 911 (1990).

BellSouth's extravagant claims of public benefit depend on mischaracterizations of both local exchange and interexchange markets.[57] As discussed above, permitting BellSouth to enter the interexchange market while it retains monopoly control of the local exchange market will harm competition in both the local and long distance markets. Moreover, because the long distance market already displays the hallmarks of a vigorously competitive market -- hundreds of new entrants; declining market share of the formerly dominant carrier; excess capacity; a high rate of customer churn; and declining prices -- BellSouth's premature entry into that market will not bring the consumer benefits BellSouth promises.

The long distance market is characterized by intense rivalry among several hundred aggressive competitors. Hubbard/Lehr Aff. ¶¶ 22-46. Moreover, since divestiture, AT&T has steadily lost long distance market share. Nationwide, AT&T's share of toll revenue has dropped from 88% in the first quarter of 1984 to 51% by the first quarter of 1997 -- an average decline of nearly 3% per year. Federal Communications Commission, Long Distance Market Shares, Industry Analysis Division, Common Carrier Bureau, July 1997, at 18, Table 8. Furthermore, AT&T's losses were not just MCI and Sprint's gains. More than three quarters of AT&T's losses between the first quarter of 1990 and the first quarter of 1997 were to hundreds of smaller interexchange carriers: As AT&T's share of revenues fell by 17.4% during this period, MCI's share increased by only 3.3% and Sprint's share increased by only 0.1%. Id. At the same time, WorldCom's share of revenues grew from 0.2% to 6.8%, and the share of the remaining

[57] See Schwartz Supp. Aff. ¶ 18 ("[T]here is much more room to improve economic performance in the local market than in the interLATA market by fostering additional competition. . . .[E]ven a modest dose of increased competition in the local market can be expected to generate major benefits -- in the form of reduced costs, improved quality, increased variety of offerings, rationalization of the price structure in local markets, as well as spillover benefits in adjacent markets for interexchange and integrated services").

carriers grew from 8.3% to 15.8%. Id. It is simply preposterous to suggest that these hundreds of firms, widely differentiated by size and geographic scope, could tacitly collude or engage in oligopolistic forbearance.

The competitive significance of the hundreds of interexchange firms is heightened by the long distance market's widespread excess capacity. Excess capacity fosters competitive pricing, because where competitors can readily expand output to meet customer demand, the market power of a firm contemplating an anticompetitive price increase is muted. See United States Department of Justice, Horizontal Merger Guidelines § 2.22 (1992). There is so much spare fiber optic capacity in the interexchange industry that AT&T's competitors could absorb one-third of AT&T's capacity within three months simply by using spare switch ports and existing transport facilities. Motion of AT&T to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, 3303-3304 (1995) ("Non-Dominance Order"). As the FCC has concluded, "AT&T's competitors have enough readily available excess capacity to constrain AT&T's pricing behavior -- i.e., that they have or could quickly acquire the capacity to take away enough business from AT&T to make unilateral price increases by AT&T unprofitable." Id. at 3303.

The intensity of competition in the long distance market is also evidenced by the frequency with which customers switch carriers. For example, in 1995, over 42 million long distance subscribers changed carriers. In 1996, after a steady barrage of price-based advertising and promotion, this number rose to 53 million subscribers. Hubbard/Lehr Aff. ¶ 45. This pronounced willingness and ability of consumers to switch long distance carriers is patently incompatible with the specious claim that the long distance market is not subject to effective competition.